

SENATE BILL No. 359

DIGEST OF INTRODUCED BILL

Citations Affected: IC 4-13-2-20; IC 4-13.6; IC 5-22.

Synopsis: Procurement and state public works. Provides that advance payment may be made for equipment or software acquired by a state agency, regardless of cost, with the prior approval of the budget agency under certain circumstances. Provides discretion to determine when retainage on a state public works contract should be placed in an escrow account. Increases the base retainage amount in such contracts from 3% to 5%. Permits an invitation to bid to contain evaluation criteria other than the specific criteria described in the statute. Authorizes a purchasing agency to conduct discussions with bidders before awarding a contract under an invitation for bids or after receiving quotes. Authorizes use of a reverse auction to issue requests for proposals (RFP) and to receive proposals. Makes other changes relating to reverse auctions. Eliminates the requirement for making a written determination as a condition to award a contract using an RFP. Permits information obtained from an offeror's proposal to be used in discussions with other offerors under certain circumstances. Repeals statutes: (1) making bidding the default procurement procedure; (2) relating to public opening of bids; (3) relating to changes in bid prices; (4) that prohibit the use of a reverse auction to purchase certain construction equipment; (5) relating to conducting discussions with offerors during an RFP process; and (6) permitting adoption of rules or policies relating to the use of an RFP in place of competitive bidding. Makes technical changes.

Effective: July 1, 2006.

Hershman

January 10, 2006, read first time and referred to Committee on Governmental Affairs and Interstate Cooperation.

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Second Regular Session 114th General Assembly (2006)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2005 Regular Session of the General Assembly.

SENATE BILL No. 359

A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 4-13-2-20, AS AMENDED BY P.L.1-2005,
2 SECTION 62, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 2006]: Sec. 20. (a) Except as otherwise provided in this
4 section, IC 12-17-19-19, or IC 12-8-10-7, payment for any services,
5 supplies, materials, or equipment shall not be paid from any fund or
6 state money in advance of receipt of such services, supplies, materials,
7 or equipment by the state.
8 (b) With the prior approval of the budget agency, payment may be
9 made in advance for any of the following:
10 (1) War surplus property.
11 (2) Property purchased or leased from the United States
12 government or its agencies.
13 (3) Dues and subscriptions.
14 (4) License fees.
15 (5) Insurance premiums.
16 (6) Utility connection charges.
17 (7) Federal grant programs where advance funding is not



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prohibited and, except as provided in subsection (i), the contracting party posts sufficient security to cover the amount advanced.

(8) Grants of state funds authorized by statute.

(9) Employee expense vouchers.

(10) Beneficiary payments to the administrator of a program of self-insurance.

(11) Services, supplies, materials, or equipment to be received from an agency or from a body corporate and politic.

(12) Expenses for the operation of offices that represent the state under contracts with the Indiana economic development corporation and that are located outside Indiana.

(13) Services, supplies, materials, or equipment to be used for more than one (1) year under a discounted contractual arrangement funded through a designated leasing entity.

(14) Maintenance of equipment and maintenance of software ~~not exceeding an annual amount of one thousand five hundred dollars (\$1,500) for each piece of equipment or each software license; if there are appropriate contractual safeguards for refunds as determined by the budget agency.~~

(15) Exhibits, artifacts, specimens, or other unique items of cultural or historical value or interest purchased by the state museum.

(c) Any state agency and any state college or university supported in whole or in part by state funds may make advance payments to its employees for duly accountable expenses exceeding ten dollars (\$10) incurred through travel approved by the employee's respective agency director in the case of a state agency and by a duly authorized person in the case of any such state college or university.

(d) The auditor of state may, with the approval of the budget agency and of the commissioner of the Indiana department of administration:

(1) appoint a special disbursing officer for any state agency or group of agencies where it is necessary or expedient that a special record be kept of a particular class of disbursements or where disbursements are made from a special fund; and

(2) approve advances to the special disbursing officer or officers from any available appropriation for the purpose.

(e) The auditor of state shall issue the auditor's warrant to the special disbursing officer to be disbursed by the disbursing officer as provided in this section. Special disbursing officers shall in no event make disbursements or payments for supplies or current operating expenses of any agency or for contractual services or equipment not

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1 purchased or contracted for in accordance with this chapter and
 2 IC 5-22. No special disbursing officer shall be appointed and no money
 3 shall be advanced until procedures covering the operations of special
 4 disbursing officers have been adopted by the Indiana department of
 5 administration and approved by the budget agency. These procedures
 6 must include the following provisions:

7 (1) Provisions establishing the authorized levels of special
 8 disbursing officer accounts and establishing the maximum
 9 amount which may be expended on a single purchase from special
 10 disbursing officer funds without prior approval.

11 (2) Provisions requiring that each time a special disbursing officer
 12 makes an accounting to the auditor of state of the expenditure of
 13 the advanced funds, the auditor of state shall request that the
 14 Indiana department of administration review the accounting for
 15 compliance with IC 5-22.

16 (3) A provision that, unless otherwise approved by the
 17 commissioner of the Indiana department of administration, the
 18 special disbursing officer must be the same individual as the
 19 procurements agent under IC 4-13-1.3-5.

20 (4) A provision that each disbursing officer be trained by the
 21 Indiana department of administration in the proper handling of
 22 money advanced to the officer under this section.

23 (f) The commissioner of the Indiana department of administration
 24 shall cite in a letter to the special disbursing officer the exact purpose
 25 or purposes for which the money advanced may be expended.

26 (g) A special disbursing officer may issue a check to a person
 27 without requiring a certification under IC 5-11-10-1 if the officer:

28 (1) is authorized to make the disbursement; and

29 (2) complies with procedures adopted by the state board of
 30 accounts to govern the issuance of checks under this subsection.

31 (h) A special disbursing officer is not personally liable for a check
 32 issued under subsection (g) if:

33 (1) the officer complies with the procedures described in
 34 subsection (g); and

35 (2) funds are appropriated and available to pay the warrant.

36 (i) For contracts entered into between the department of workforce
 37 development or the Indiana commission on vocational and technical
 38 education and:

39 (1) a school corporation (as defined in IC 20-18-2-16); or

40 (2) a state educational institution (as defined in IC 20-12-0.5-1);

41 the contracting parties are not required to post security to cover the
 42 amount advanced.

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SECTION 2. IC 4-13.6-3-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 3. (a) There is established a certification board. The following persons shall serve on the certification board:

(1) The ~~state building commissioner~~, **code compliance officer of the department of homeland security**.

(2) The ~~chief engineer~~ **director of engineering** of the department of natural resources.

(3) The director.

(b) The board shall administer IC 4-13.6-4.

SECTION 3. IC 4-13.6-7-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 2. (a) If the estimated cost of a public works project is one hundred fifty thousand dollars (\$150,000) or more, the division shall include as part of the public works contract provisions for the retainage of portions of payments by the division to the contractor, by the contractor to subcontractors, and for the payment of subcontractors and suppliers by the contractor. The contract must provide that the division may withhold from the contractor sufficient funds from the contract price to pay subcontractors and suppliers as provided in section 4 of this chapter.

(b) A public works contract and contracts between contractors and subcontractors, if portions of the public works contract are subcontracted, ~~must~~ **may** include a provision that at the time any retainage is withheld, the division or the contractor, as the case may be, ~~shall~~ **may** place the retainage in an escrow account, **as mutually agreed**, with:

(1) a bank;

(2) a savings and loan institution;

(3) the state of Indiana; or

(4) an instrumentality of the state of Indiana;

as escrow agent. The parties to the contract shall select the escrow agent by mutual agreement. The parties to the agreement shall enter into a written agreement with the escrow agent.

(c) The escrow agreement must provide the following:

(1) The escrow agent shall promptly invest all escrowed principal in the obligations that the escrow agent selects, in its discretion.

(2) The escrow agent shall hold the escrowed principal and income until it receives notice from both of the other parties to the escrow agreement specifying the percentage of the escrowed principal to be released from the escrow and the persons to whom this percentage is to be released. When it receives this notice, the escrow agent shall promptly pay the designated percentage of

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escrowed principal and the same percentage of the accumulated escrowed income to the persons designated in the notice.

(3) The escrow agent shall be compensated for its services as the parties may agree. The compensation shall be a commercially reasonable fee commensurate with fees being charged at the time the escrow fund is established for the handling of escrow accounts of like size and duration. The fee must be paid from the escrowed income of the escrow account.

(d) The escrow agreement may include other terms and conditions that are not inconsistent with subsection (c). Additional provisions may include provisions authorizing the escrow agent to commingle the escrowed funds held under other escrow agreements and provisions limiting the liability of the escrow agent.

SECTION 4. IC 4-13.6-7-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 3. (a) To determine the amount of retainage to be withheld, the division shall elect one (1) of the following options:

(1) To withhold ~~no not~~ more than ~~six ten~~ percent ~~(6%)~~ **(10%)** of the dollar value of all work satisfactorily completed until the public work is fifty percent (50%) complete, and nothing further after that.

(2) To withhold ~~no not~~ more than ~~three five~~ percent ~~(3%)~~ **(5%)** of the dollar value of all work satisfactorily completed until the public work is substantially complete.

(b) If upon substantial completion of the work there are any remaining uncompleted minor items, the division shall withhold, until those items are completed, an amount equal to four hundred percent (400%) of the value of each item as determined by the architect-engineer.

SECTION 5. IC 5-22-7-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 2. (a) A purchasing agent ~~shall~~ **may** issue an invitation for bids.

(b) An invitation for bids must include the following:

(1) A purchase description.

(2) All contractual terms and conditions that apply to the purchase.

(3) A statement of ~~the evaluation criteria that will be used, including any of the following:~~ **which, if any, of the following will be used to evaluate bids:**

(A) Inspection.

(B) Testing.

(C) Quality.

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(D) Workmanship.

(E) Delivery.

(F) Suitability for a particular purpose.

(G) The requirement imposed under IC 5-22-3-5.

(H) Any other evaluation criteria stated in the invitation for bids.

~~(4) The time and place for opening the bids.~~

~~(5) (4)~~ A statement concerning whether the bid must be accompanied by a certified check or other evidence of financial responsibility that may be imposed in accordance with rules or policies of the governmental body.

~~(6) (5)~~ A statement concerning the conditions under which a bid may be canceled or rejected in whole or in part as specified under IC 5-22-18-2.

(6) A statement concerning whether, and the procedures under which, discussions may be conducted with bidders before a contract is awarded. The procedures for conducting discussions with bidders must be consistent with fair competition among all bidders.

SECTION 6. IC 5-22-7-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 7. Bids must be:

~~(1) unconditionally accepted without alteration or correction; except as provided in sections 11 through 13 of this chapter;~~

(1) opened so as to avoid disclosure of contents to competing bidders during the process of negotiation; and

(2) evaluated based on the requirements provided in the invitation for bids.

SECTION 7. IC 5-22-7.5-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 1. (a) A purchasing agency may conduct a reverse auction for the purchase of supplies by using an Internet purchasing site to:

(1) issue an invitation for bids or request for proposals; and

(2) receive bids or proposals.

(b) Except as provided in this chapter, a purchasing agency, and a bidder, and an offeror must comply with the requirements of this article when participating in a reverse auction.

(c) A purchasing agency may obtain pricing through means other than a reverse auction before conducting a reverse auction.

SECTION 8. IC 5-22-7.5-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 2. (a) Before conducting a reverse auction, the purchasing agency must adopt written policies that do the following:

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- (1) Establish procedures for all the following:
 - (A) Transmitting notices, solicitations, and specifications.
 - (B) Receiving offers.
 - (C) Making payments.
 - (D) Protecting
 - (i) the identity of a **bidder** or an offeror. ~~and~~
 - (ii) ~~the amount of an offer until the time fixed for the opening of offers.~~
 - (E) For a reverse auction, providing for the display of the amount of each offer previously submitted for public viewing.
 - (F) Establishing the deadline by which offers must be received and will be considered to be open and available for public inspection.
 - (G) Establishing the procedure for the opening of offers.
- (2) Require the purchasing agency to maintain adequate documentation regarding reverse auctions so that the transactions may be audited as provided by law.

(b) Written policies that comply with rules for an Internet public purchasing site adopted by the Indiana department of administration under IC 4-13-17-4 satisfy the requirements of this section.

SECTION 9. IC 5-22-7.5-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 6. ~~For purposes of IC 5-22-7-6, a bid made through an Internet purchasing site is considered to be opened when a computer generated record of the information contained in all bids for a proposed purchase that were received by the site not later than the posted bid deadline is reviewed publicly by After bids or proposals are received, the purchasing agency in the presence of one (1) or more witnesses at the time and place designated in the invitation for bids. may conduct discussions with bidders or offerors as provided in IC 5-22-7 or IC 5-22-9 before making an award.~~

SECTION 10. IC 5-22-8-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 3. (a) This section applies only if the purchasing agent expects the purchase to be:

- (1) at least twenty-five thousand dollars (\$25,000); and
- (2) not more than seventy-five thousand dollars (\$75,000).

(b) A purchasing agent may purchase supplies under this section by inviting quotes from at least three (3) persons known to deal in the lines or classes of supplies to be purchased.

(c) The purchasing agent shall mail an invitation to quote to the persons described in subsection (b) at least seven (7) days before the time fixed for receiving quotes.

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(d) If the purchasing agent receives a satisfactory quote, the purchasing agent shall award a contract to the lowest responsible and responsive offeror for each line of class of supplies required. **After receiving and opening quotes, the purchasing agency may conduct discussions with offerors as provided in IC 5-22-7 before making an award.**

(e) The purchasing agent may reject all quotes.

(f) If the purchasing agent does not receive a quote from a responsible and responsive offeror, the purchasing agent may purchase the supplies under IC 5-22-10-10.

SECTION 11. IC 5-22-9-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 1. ~~When A purchasing agent makes a written determination that the use of competitive sealed bidding is either not practicable or not advantageous to the governmental body, the purchasing agent may award a contract using the procedure provided by this chapter. instead of competitive sealed bidding under IC 5-22-7.~~

SECTION 12. IC 5-22-9-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 2. The purchasing agent shall solicit proposals through a request for proposals, which must include the following:

(1) The factors or criteria that will be used in evaluating the proposals.

(2) A statement concerning the relative importance of price and the other evaluation factors.

(3) A statement concerning whether the proposal must be accompanied by a certified check or other evidence of financial responsibility, which may be imposed in accordance with rules of the governmental body.

(4) A statement concerning whether discussions **and negotiations** may be conducted with responsible offerors, ~~who submit proposals determined to be reasonably susceptible of being selected for in the discretion of the purchasing agency, before an award is made.~~

SECTION 13. IC 5-22-9-9 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 9. Offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revisions of proposals. In conducting discussions with an offeror, information derived from proposals submitted by competing offerors may ~~not be disclosed: used in discussion only if the identity of the offeror providing the information is not disclosed to others.~~ **The purchasing agency must provide equivalent information to all**

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1 **offerors with which the purchasing agency chooses to have**
2 **discussions.**

3 SECTION 14. THE FOLLOWING ARE REPEALED [EFFECTIVE
4 JULY 1, 2006]: IC 5-22-7-1; IC 5-22-7-6; IC 5-22-7-11; IC 5-22-7.5-8;
5 IC 5-22-9-6; IC 5-22-9-8.

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